No. 83-774

In the Supreme Court of the United States

OCTOBER TERM, 1983

HRATCH K. SARIAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in holding that the failure of the indictment in this case to allege expressly that petitioner's narcotics distribution activities were outside the usual course of his pharmacy business did not amount to a "manifest miscarriage of justice."

2. Whether the district court's instruction to the jury that the drugs listed in the indictment were controlled substances "as a matter of law" amounted to plain error.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A5) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on August 5, 1983. A petition for rehearing was denied on September 7, 1983 (Pet. App. A7). The petition for a writ of certiorari was filed on November 7, 1983 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioner and co-defendants Paul F. Gaynor and Samuel I. Guttler were convicted on five counts of unlawfully distributing controlled substances, in violation of 21 U.S.C. 841(a)(1)

(counts two through six), and of conspiring to do so, in violation of 21 U.S.C. 846 (count one). Petitioner also was convicted on three counts of failing to maintain accurate records relating to the purchase and dispensing of controlled substances, in violation of 21 U.S.C. 842(a)(5) and 843(a)(4) (counts seven through nine). Petitioner was sentenced to a total term of imprisonment of ten years, to be followed by three years' special parole and five years' probation, and was fined $25,000 (Pet. App. A16-A17).[1] The court of appeals affirmed (*id.* at A1-A5).

The evidence adduced at trial showed that in August 1979 petitioner, a registered pharmacist, purchased a pharmacy in Philadelphia, Pennsylvania, and hired two other pharmacists, co-defendants Gaynor and Guttler, to help him operate the business. During September and October 1980, acting pursuant to an administrative warrant, Drug Enforcement Administration investigators audited the pharmacy's records for the approximately one-year period petitioner had owned the pharmacy.[2] The audit revealed that during that period the pharmacy had received a total of more than 300,000 tablets of Dilaudid, Preludin, Quaalude, Ritalin and Talwin, 1, 956 gallons of Bromanyl, and 7,350 ounces of Tussionex Suspension that were unaccounted for in

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[1]Specifically, petitioner was sentenced to ten years' imprisonment and three years' special parole on count two. He was sentenced to five years' imprisonment and three years' special parole on counts three and four, three years' imprisonment and three years' special parole on count five, one year's imprisonment on count six, four years' imprisonment on counts seven and eight and one year's imprisonment on count nine, all of which sentences were to run concurrently with the sentence imposed on count two. Petitioner was fined $25,000 on count one and sentenced to five years' probation to be served consecutively to the period of imprisonment imposed on count two. Pet. App. A16-A17.

[2]During the course of the audit, the investigators also examined the records of wholesale drug distributors that had sold drugs to petitioner's pharmacy (II C.A. App. 108-111).

prescription or inventory records.[3] In addition, the audit revealed that many of the prescriptions in the pharmacy's files did not contain the signature of the pharmacist who filled them or the date on which they were filled, or otherwise failed to conform to DEA regulations, and that many prescriptions were for extraordinary quantities of drugs. II C.A. App. 95-116.

During the course of the audit, petitioner admitted to the investigators that he had paid all of the bills for all of the drugs in the pharmacy and falsely stated that he had provided them with all of his purchase records. When confronted with the results of the audit, petitioner first claimed that he had no explanation for the shortages. II C.A. App. 161-162. Later that same day, petitioner told one of the investigators that "he wanted to confess to what happened to the drugs" and that "his life was threatened and somebody was going to blow up his business" (*id.* at 163).

Four months later, on February 20, 1981, the investigators seized petitioner's pharmacy records pursuant to a search warrant. Many of the prescriptions that had been reviewed during the audit had been altered by inclusion of the signatures of petitioner or his co-defendants, and some had been altered by inclusion of refill designations. A spot check of the purported patient addresses on 14 prescriptions revealed that 12 addresses did not exist and that the two legitimate addresses were not the residences of the patients indicated on the prescriptions. II C.A. App. 106-107, 166-168.

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[3]That accounting credited the pharmacy with all prescriptions in its files, including many prescriptions that the investigators suspected were invalid and that later proved to have been forged (II C.A. App. 114-115).

The trial testimony of five physicians whose names appeared on the seized prescriptions established that many of the signatures had been forged (II C.A. App. 57-60, 132-138, 228-235, 248-251, 258-262). In addition, three pharmacists who had interned at petitioner's pharmacy during the audit period testified that all three defendants had filled suspicious looking or "phony" prescriptions and had dispensed unusually large quantities of drugs without prescriptions, often to the same customer (III C.A. App. 316-319, 360-386, 390-400, 590-600, 607-610). One intern had observed a list hanging behind the pharmacy counter that quoted higher prices for filling phony prescriptions (*id.* at 596) and had noticed petitioner counting large sums of money on days when phony prescriptions had been filled (*id.* at 609-610). Finally, a witness who recently had been convicted on federal drug charges testified that he had purchased large quantities of Bromanyl from petitioner and his co-defendants, either by using illegitimate prescriptions or without prescriptions (*id.* at 475-488, 506).

ARGUMENT

1. Section 841(a)(1) of Title 21 makes the distribution or dispensing of drugs unlawful "[e]xcept as authorized by this subchapter." Section 822(b), in turn, provides that "[p]ersons registered * * * under this subchapter to * * * distribute, or dispense controlled substances are authorized to possess, * * * distribute, or dispense such substances * * * to the extent authorized by their registration and in conformity with the other provisions of this subchapter." Section 822(b) does not create a "blanket authorization" for registered practitioners to dispense controlled substances, but merely exempts them from conviction under Section 841 unless "their activities fall outside the usual course of professional practice." *United States* v. *Moore*, 423 U.S. 122, 124, 131 (1975). Petitioner, a registered pharmacist, contends (Pet. 8-13) that the exception provided in Section

822(b) is an element of the offense proscribed in Section 841 and that, therefore, his indictment was fatally deficient because it failed to allege that he had acted outside the usual course of his professional practice. Petitioner's contention is without merit.

By the plain terms of the statute, the presence of a legitimate medical purpose for dispensing controlled substances is a statutory exception to Section 841(a)(1), not an essential element of the offense that must be alleged in the indictment. Moreover, 21 U.S.C. 885(a)(1) expressly provides:

> It shall not be necessary for the United States to negative any exemption or exception set forth in this subchapter in any complaint, information, indictment, or other pleading or in any trial, hearing, or other proceeding under this subchapter, and the burden of going forward with the evidence with respect to any such exemption or exception shall be upon the person claiming its benefit.

Thus, even assuming the government bears the ultimate burden of proof on the issue, it is not required expressly to allege in the indictment that the drugs were distributed outside the usual course of a registered practitioner's practice. See *United States* v. *Seelig*, 622 F.2d 207, 211-212 (6th Cir.), cert. denied, 449 U.S. 869 (1980). See also *United States* v. *Roya*, 574 F.2d 386, 391 (7th Cir.), cert. denied, 439 U.S. 857 (1978). As petitioner notes (Pet. 10), two courts have reached a contrary result. See *United States* v. *Outler*, 659 F.2d 1306, 1308-1311 (5th Cir. 1981); *United States* v. *King*, 587 F.2d 956, 963-964 (9th Cir. 1978). In neither of those cases, however, did the court address, or even appear to be aware of, Section 885(a)(1).

In any event, this case does not present a suitable vehicle in which to resolve the question whether the medical exception must be expressly negated in the indictment, because the court of appeals did not answer that question. Because petitioner failed to object to the indictment at trial, the court of appeals limited its consideration of the sufficiency of the indictment to the question whether the asserted defect "amount[ed] to a manifest miscarriage of justice" (Pet. App. A3). The holding of the court of appeals thus represents only a determination (*ibid.*) that, "assuming *arguendo* that the indictment should have alleged that [petitioner] distributed controlled substances outside the ordinary course of his pharmacy business," the failure of the indictment to do so did not "redound[] to [petitioner's] substantial prejudice."[4]

That conclusion is entirely correct. As the court of appeals held (Pet. App. A4-A5), and as petitioner does not dispute (see Pet. 11 n.6), the indictment afforded petitioner adequate notice of the charges against him. Moreover, the court correctly concluded (Pet. App. A4-A5) that petitioner's Fifth Amendment right to an indictment by grand jury was not violated by the failure to allege expressly that petitioner's narcotics activities were outside the ordinary course of his pharmacy business:

> One of the overt acts charged in the conspiracy count against [petitioner] alleges that he conspired to sell outside the ordinary course of his pharmacy business. We think it reasonable to infer from this allegation that

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[4]Although, as petitioner notes (Pet. 13), the failure of an indictment to charge an offense may be raised at any time (see Fed. R. Crim. P. 12(b)(2)), "failure to object until after the verdict dictates that the indictment be construed liberally and not held invalid absent a showing of actual prejudice." *United States* v. *Previte*, 648 F.2d 73, 80 (1st Cir. 1981); see also *United States* v. *Hart*, 640 F.2d 856, 857-858 (6th Cir.), cert. denied, 451 U.S. 992 (1981).

> the grand jury had before it evidence of [petitioner's] excesses and indicted him for his activity outside legally permissible limits as a pharmacist. At least, we cannot say that the indictment is so lacking in this assurance that we should consider the assumed deficiency as a manifest miscarriage of justice.
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> * * * * *
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> Finally, we note that the substantiality of the government's proof as to [petitioner's] distribution outside the course of his professional practice tends to ameliorate any residual prejudice that [petitioner] might have experienced due to the omission of the alleged element.[5]

Petitioner's reliance (Pet. 11-12) on *Joplin Mercantile Co.* v. *United States*, 236 U.S. 531, 535-536 (1915), for the proposition (Pet. 12) that "an overt act cannot be used * * * to save an otherwise deficient substantive count" is misplaced. In *Joplin*, the Court opined that allegations made in the overt act clauses of a conspiracy indictment could not supply an element missing from the "agreement" clause of the indictment because "the making of the unlawful agreement relates to the acts of all the accused, while overt acts may be done by one or more less than the entire number" (236 U.S. at 536). That observation is inapposite to the present case, however, because the overt act on which the court below relied was specifically alleged to have been committed by petitioner (I C.A. App. 8a).[6]

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[5] We note that petitioner's defense at trial was that he had nothing to do with the charged activities, not that the charged activities were for legitimate medical purposes (IV C.A. App. 724-782).

[6] The Court's observation in *Joplin* in any event was dictum, in view of its conclusion that the omitted allegation was not an element of the offense charged and consequent affirmance of the conviction. Similarly, in *United States* v. *Wander*, 601 F.2d 1251, 1259 (3d Cir. 1979),

2. Petitioner's further contention (Pet. 13-18), that the district court's instruction to the jury that the brand name drugs listed in the indictment were controlled substances "as a matter of law" amounted to a " 'partial directed verdict,' " also is without merit.

We note at the outset that petitioner failed to object at trial to the instruction he now challenges in this Court, notwithstanding that the government proposed the instruction in writing and that the district judge held a conference on the proposed instructions at which he approved the instruction now challenged (IV C.A. App. 808-809, 941). By failing to object to the instruction either at the time it was proposed or when it was given, petitioner failed to comply with the contemporaneous objection requirement contained in Rule 30 of the Federal Rules of Criminal Procedure. Accordingly, as petitioner concedes (Pet. 18), he would be entitled to reversal of his conviction only if the instruction constituted plain error or affected his substantial rights. See Fed. R. Crim. P. 52(b). That clearly is not the case here.

Contrary to petitioner's assertion (Pet. 14-15), there was substantial evidence that the drugs petitioner was charged with having distributed were controlled substances. The DEA case agent testified that he and the other investigator conducted an inventory of the *controlled substances* in petitioner's pharmacy (II C.A. App. 97-102). The inventoried substances were the same drugs listed in the indictment, (compare II C.A. App. 188-189 and Gov't Exh. VII with I C.A. App. 7a, 9a-13a). In addition, the agent expressly

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on which petitioner also relies (Pet. 12), the court upheld the conspiracy conviction notwithstanding the failure of the indictment to allege all of the elements of the offense. In any event, any conflict between the decision below and *Wander* is for the Third Circuit to resolve. See *Wisniewski* v. *United States*, 353 U.S. 901 (1957). Cf. Pet. App. A4 n.2.

testified that the drugs listed in the indictment were controlled substances (II C.A. App. 115-116, 188-189). There also was medical testimony to the effect that four of the drugs listed in the indictment (Bromanyl, Tussionnex, Dilaudid, and Percodan) contain narcotic elements and that three of those drugs are controlled substances (II C.A. App. 134, 232, 260; III C.A. App. 592).[7] One of petitioner's suppliers further testified that four of the drugs included in the indictment and regularly purchased by petitioner's pharmacy (Preludin, Percodan, Ritalin, and Quaalude) are controlled substances (II C.A. App. 270-273).

Moreover, petitioner did not contest at trial—and does not now dispute—that the drugs that he was charged with unlawfully distributing were in fact controlled substances. In these circumstances, it is beyond doubt that the district court's instruction to the jury that the drugs listed in the indictment were controlled substances "as a matter of law" could not have adversely affected petitioner's substantial rights. See, *e.g., United States* v. *Piggie*, 622 F.2d 486, 488 (10th Cir.), cert. denied, 449 U.S. 863 (1980) (holding that reversal of the defendant's conviction simply because the trial court failed to instruct the jury that it was not required to accept a judicially noticed element of the offense "would be an exercise in the absurd" where there was evidence of the judicially noticed element in the record and where the element was not seriously in dispute);[8] see also *McGuinn* v.

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[7]According to the medical testimony, Ambenyl and Bromanyl refer to the same drug (II C.A. App. 154).

[8]Petitioner errs in stating (Pet. 17 n.10) that the reason the court of appeals upheld the conviction in *Piggie* was that "the trial judge[] had told the jur[y] to treat the judicially noticed fact like the other evidence, and * * * they were free to accept or reject those facts." To the contrary, the court of appeals refused to set aside the conviction in *Piggie* notwithstanding the fact that the jury may have considered itself "bound by the court's taking judicial notice" (622 F.2d at 488). Indeed, although the district court instructed the jury that it was the exclusive judge of the

Crist, 657 F.2d 1107, 1108-1109 (9th Cir. 1981) ("[w]hen a jury is properly instructed with respect to the only disputed issues in the case, the erroneous instruction with respect to an undisputed issue is harmless error").

Finally, contrary to petitioner's assertion (Pet. 16-18), the refusal of the court of appeals (Pet. App. A2 n.1) to reverse petitioner's conviction on the basis of the challenged instruction does not conflict with the Sixth Circuit's decision in *United States* v. *Jones*, 580 F.2d 219 (1978). In that case, the court of appeals reversed a conviction for illegally intercepting telephone conversations where "the government offered no evidence to show that South Central Bell was at the time a 'person engaged as a common carrier in providing or operating . . . facilities for the transmission of interstate or foreign communications,' " as required by 18 U.S.C. 2510(1). 580 F.2d at 221. By contrast, as we showed above, there was ample evidence in the record of this case that the drugs listed in the indictment were controlled substances and, indeed, petitioner never has contended otherwise. In these circumstances, it cannot seriously be claimed that petitioner's substantial rights were affected by the challenged instruction.

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evidence, including " 'all facts which may have been admitted or stipulated' " (622 F.2d at 489), it did not refer expressly to facts judicially noticed. Accordingly, the court of appeals alluded to these additional general instructions only in an appendix to its opinion (*ibid.*); they plainly did not serve as the basis for its decision.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1984

DOJ-1984-01